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OF THE TTAB**

October 3, 2003
Paper No. 9
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Barcrest, Inc.**

Serial No. 76**341740**

Joseph L. Johnson of Lathrop & Gage L.C. for **Barcrest, Inc.**

Robert Clark, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney).

Before **Seeherman, Hohein** and **Hairston**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

Barcrest, Inc. has filed an application to register the
term "SHOTFINDER," in the format reproduced below,

SHOTfinder

for "accessories for hunters, namely[,] electronic devices for
detecting and signaling the presence of metal objects in the
flesh of game animals."¹

¹ Ser. No. 76341740, filed on November 26, 2001, which alleges a date
of first use anywhere of March 15, 2001 and a date of first use in
commerce of May 18, 2001.

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the term "SHOTFINDER" is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the

product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, while acknowledging in its brief that it "does not deny that it may be asserted that Applicant's mark suggests that the goods could be used to locate shot (metal pieces from a shotgun shell)," argues that the term "SHOTFINDER" is suggestive rather than merely descriptive of its accessories for hunters, namely, electronic devices for detecting and signaling the presence of metal objects in the flesh of game animals. Among other things, applicant asserts that "SHOTFINDER is not a 'dictionary word', nor is it, as far as Applicant is aware, a word which had any existence in the common vernacular until Applicant coined it." Applicant urges, in view thereof, that such term "is a short, catchy way of suggesting unique characteristics of the goods" and that any "potential competitors (of which there are presently none, due to the novel and proprietary nature of Applicant's business and products) would be able to describe similar products and advertise them without the use of the term coined by ... Applicant." According to applicant, "the word SHOTFINDER suggest[s] to consumers what the goods are capable of doing, namely[,] locating shotgun pellets or bullets, but [it] does not specify or suggest how they will be located, from where they will be located or what happens once they are located."

Furthermore, applicant notes that incongruity in a term "is a strong indicator of suggestiveness" and contends that "the

coined term SHOTFINDER" (stylized) is particularly incongruous because no one has ever produced or marketed a device for locating metal shot in game animals." Applicant thus maintains that the coined term "SHOTFINDER," "including the stylized 'look' of the mark," is not merely descriptive of its goods. In addition, applicant insists that, even if the words "shot" and "finder" are regarded as merely descriptive of its goods by themselves, the combination thereof into the term "SHOTFINDER" results in a valid mark which is not merely descriptive, citing *In re Chesapeake Corp. of Virginia*, 420 F.2d 754, 164 USPQ 395, 396 (CCPA 1970) ["SUPERWATERFINISH" for kraft paper held registrable, and not merely descriptive, in view of showing of acquired distinctiveness inasmuch as such term is neither generic nor so highly descriptive as to be incapable of registration] and *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) ["SUGAR & SPICE" for bakery products found registrable as a suggestive rather than merely descriptive term].

The Examining Attorney, on the other hand, argues that the term "SHOTFINDER" is merely descriptive of applicant's goods, pointing out in his brief that The American Heritage Dictionary of the English Language (3rd ed. 1992) defines "shot" in relevant part as "**8. a.** A solid projectile designed to be discharged from a firearm or cannon. **b. plural shot** Such projectiles considered as a group. **c. plural shot** Tiny lead or steel pellets, especially ones used in a shotgun cartridge. **d.** One of these pellets" and lists "finder" in pertinent part as "**1.** One that finds: *a finder of great hidden treasure.*" Based on such

definitions alone, which are of record, the Examining Attorney contends that, "[l]iterally, applicant's mark means something that finds shot" and that the "metal objects" which applicant's electronic devices detect and signal the presence of in the flesh of game animals include "shot," in the sense of lead or steel pellets used in a shotgun cartridge. Thus, the Examining Attorney maintains that the term "SHOTFINDER" "is at least prima facie descriptive" of a characteristic or feature of applicant's goods.

Moreover, in his brief the Examining Attorney further points out, in support of his position, that as shown on the front of the packaging for applicant's goods which applicant submitted as specimens of use:

The specimens of record indicate that applicant's goods "[d]etect elusive pieces of shot before cooking", [e]liminate discomfort of biting into shot" and "[m]akes traditional Game Bird cleaning obsolete". In addition, the specimens implore purchasers to "[u]se SHOTfinder to ensure your gourmet creations are SHOT-FREE!" "

The back of such specimens, we notice, also contains the following information about applicant's goods (bold in original):

IN THE FIELD

Clean your game birds as you normally would. Remove any visible shot Then turn your SHOTfinder on Next, while holding the SHOTfinder away from any metal, adjust the sensitivity control carefully to the critical point at which the internal beeper silences. Begin scanning the parts of your game bird intended for consumption by slowly passing the detecting unit (front lower area of your SHOTfinder) thoroughly over each area intended for consumption paying particular attention to those areas where shot may have appeared to enter. When shot is detected, the LED indicator lights will illuminate and

the internal beeper will sound. Press the on/off button to turn your SHOTfinder off when you are finished scanning.

NOTE: Scanning too quickly, avoiding close contact with your game bird or scanning with the wrong area of the detecting unit may prevent your SHOTfinder from sensing and alerting the presence of shot.

IN YOUR KITCHEN

While most shot will be detected and removed during field processing, a thorough scanning with your SHOTfinder at this stage of game bird preparation is suggested to help detect and eliminate any elusive shot. Pay particular attention to any area where shot appears to have entered. It is recommended that you fillet when possible to allow access to both sides of your desired servings for effective thorough scanning and shot detection.

AT YOUR GRILL

.... Now is the time for you to make final use of your SHOTfinder. Although it is unlikely that any shot has been missed at this point, you'll receive hero's honors if you discover even one isolated piece of shot that had been accidentally overlooked.

In addition, under the heading of "**Specifications**," we observe that the back of applicant's specimens of use includes references to, *inter alia*, both "**Shot Detected:** Responds equally well to all types of shot used in commercially sold shot shells" and "**Alert Indicators:** Tone Beeper & LED RED Lights indicate the presence of any type or size of metal shot" (bold in original).

In view of the above evidence, and inasmuch as, while scarcely unique, the stylized manner in which applicant uses the term "SHOTFINDER," namely, "SHOTfinder," makes the constituent elements of such term even more readily apparent to customers for and users of its goods, we agree with the Examining Attorney that consumers would immediately understand that the term "SHOTFINDER"

merely describes a significant characteristic or feature of its goods, as well as their purpose or function. Specifically, such term conveys forthwith, without speculation or conjecture, that applicant's goods are used to find shot in the flesh of game animals. There is nothing in the combination of the constituent words "shot" and "finder" into the term "SHOTFINDER" which is incongruous, ambiguous or suggestive of a double entendre, nor is there anything about such term which is "catchy" as contended by applicant.

Admittedly, it is possible, as applicant argues, for individually descriptive words to be combined to form a valid, registrable mark which, as a whole, is not merely descriptive. However, as indicated by the Board in, for example, *In re Medical Disposables Co.*, 25 USPQ2d 1801, 1804 (TTAB 1992), in order for such to be the case:

[T]he mere act of combining does not in itself render the resulting composite a registrable trademark. Rather, it must be shown that in combination the descriptiveness of the individual words has been diminished, [such] that the combination creates a term so incongruous or unusual as to possess no definitive meaning or significance other than that of an identifying mark for the goods. See *In re Calspan Technology Products, Inc.*, 197 USPQ 647 (TTAB 1977).

In this instance, applicant has not combined the clearly descriptive words "shot" and "finder" in a bizarre or unusual way. Instead, the individual components of the combined term "SHOTFINDER," especially in light of their manner of use by applicant, as noted previously, in the format "SHOTfinder," plainly have a meaning in combination which is immediately

recognizable and identical to that of their separate connotations. Thus, there is simply nothing in the term "SHOTFINDER," including its stylized manner of display, which is so incongruous or unusual as to possess no definitive meaning or significance other than that of an identifying mark for applicant's goods, nor does such composite term otherwise possess a new meaning different from that of its component elements.

Consequently, there is nothing in the term "SHOTFINDER" which, when used in connection with applicant's goods, requires the exercise of imagination, cogitation or mental processing or necessitates the gathering of further information in order for the merely descriptive significance thereof to be immediately apparent. Plainly, to hunters, who along with their friends and relatives obviously constitute the customer base for applicant's "accessories for hunters, namely[,] electronic devices for detecting and signaling the presence of metal objects in the flesh of game animals," the term "SHOTFINDER" immediately conveys that a principal feature or characteristic of such goods, as well as their purpose or function, is to find shot embedded in the flesh of game animals. The term "SHOTFINDER" is accordingly merely descriptive of applicant's goods within the meaning of the statute.

As to applicant's remaining arguments, the Examining Attorney correctly points out that it is well settled that the fact that an applicant may be the first and/or sole user of a merely descriptive term does not entitle it to registration thereof where, as here, the term projects only a merely

descriptive significance in the context of applicant's goods. See, e.g., In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983); and In re Mark A. Gould, M.D., 173 USPQ 243, 245 (TTAB 1972). Thus, as the Examining Attorney further notes, "the fact that applicant may be the only purveyor of shot finders to use the term 'SHOTfinder' does not mean that the term will be perceived as a trademark rather than as a [merely] descriptive term." Additionally, the Examining Attorney properly notes that the fact that a term is not found in the dictionary is not controlling on the question of registrability. See, e.g., In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987); and In re Orleans Wines, Ltd., 196 USPQ 516, 517 (TTAB 1977).

Moreover, that potential competitors of applicant may be able to describe and advertise the same or similar goods by terms other than "SHOTFINDER" (e.g., "pellet detector" or "shot locator") does not mean that such term is not merely descriptive of applicant's goods. See, e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). As the Examining Attorney points out in his brief, "[w]hile there may be other ways of referring to applicant's product, the term "SHOTfinder" is certainly an alternative way of stating that the goods find shot." Finally, as to applicant's contention that the term "SHOTFINDER" is not merely descriptive of its goods inasmuch as it does not specify how shot "will be located, from where they will be located or what happens once they are located," suffice it to say that as set forth, for

example, in *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001):

Dial-A-Mattress argues that its mark ["1-888-M-A-T-R-E-S-S'"] is not descriptive because, although it suggests the nature of its [telephone shop-at-home mattress retail] services, it does not describe their full scope and extent. This argument is unavailing because the mark need not recite each feature of the relevant goods or services in detail to be [merely] descriptive. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982).

It therefore is not necessary, as the Examining Attorney properly observes, that a term describe all of the purposes, functions, uses, characteristics or features of an applicant's goods to be merely descriptive. It is enough, as is the case herein, if the term instead describes any significant aspect or attribute of the goods. See, e.g., *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re H.U.D.D.L.E.*, supra at 359; and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Decision: The refusal under Section 2(e)(1) is affirmed.